FILED
AUG 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 77-2841

October Term, 1976

STANLEY SHEIKOWITZ,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK STATE SUPREME COURT FOR THE THIRD JUDICIAL DEPARTMENT

GRECO & FARALDO
Attorneys for Petitioner
125-10 Queens Boulevard
Kew Gardens, N.Y. 11415
(212) 544-6800

JOSEPH A. FARALDO
Of Counsel

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Reasons for Granting the Writ	6
Conclusion	10

Cases Cited

Finn's Liquor Shop, Inc. v. State Liquor Authority, 24 N.Y.2d 647, 301 N.Y.S. 2d 584, 249 N.E.2d 440	8
Matter of Leogrande v. State Liquor Authority, 25 A.D. 2d 225, 268 N.Y.S.2d 433	8
One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170	7
Sherman v. U.S., 356 U.S. 369, 78 S. Ct. 819, 2 L.Ed. 2d 848	6

Other Authorities

14th Amendment	2
28 U.S.C. 1257	2
c. 40.05 Penal Law, State of New York	6

INDEX TO APPENDIX

	Page
Order Denying Leave to Appeal	1a
Opinion of Appellate Division	4a
Report of Findings, Determination a d Recommendation	6a
Report of the Regents Review	11a

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No.

STANLEY SHEIKOWITZ,
Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK STATE SUPREME COURT FOR THE THIRD JUDICIAL DEPARTMENT

Petitioner Stanley Sheikowitz prays that a writ of certiorari issue to review the judgment of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department entered in the above case on the 2nd day of June, 1977 to the extent that it affirmed administrative punishment imposed upon petitioner suspending his license as a pharmacist.

OPINIONS BELOW

The opinion of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department entered on the 2nd day of June 1977, affirming the order of respondent suspending petitioner's pharmacy license for three (3) months is not yet officially reported and is annexed hereto at pages 2a-3a. Leave to appeal to the New York State Court of Appeals was denied in July, 1977.

JURISDICTION

The judgment of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department was entered on the 2nd day of June, 1977 affirming administrative punishment of license suspension imposed upon petitioner (pages 2a-3a). The jurisdiction of this court is invoked under 28 U.S.C. 1257.

QUESTIONS PRESENTED

Whether due process of law is violated by an administrative agency which refuses to recognize the defense and proof of entrapment and imposes a ninety (90) day suspension on a duly licensed

CONSTITUTIONAL AMENDMENT INVOLVED

The Fourteenth Amendment:

> "1 . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner is a licensed pharmacist in the State of New York and owns and operates a pharmacy known as Mid-Ville Chemists, Inc. which is located at 225 Post Avenue, Westbury, New York.

It was charged that on or about the 26th day of February, 1974 at the pharmacy which petitioner owns and operates, petitioner sold and dispensed approximately 990 tablets, (472.52 grams gross weight) of Diethylpropion Hydrocloride, a prescription required drug, but without a

prescription, either written or oral from an authorized prescriber.

Petitioner was served with Notice of Charges and a full evidentiary hearing was held before the State Board of Pharmacy. It developed that Det. Piccininni of the Nassau County Police Department and Drug Enforcement Administration Agent Graffan used an informer, George Goldstein, to solicit one Roger Wroobel to indiscriminately entrap persons into engaging in illegal drug transactions. Without asking any questions as to how he would operate, the two law enforcement officers turned Wroobel loose to try to make an illicit buy.

Wroobel chose petitioner, a registered pharmacist, whom he had known for eight and one-half years, to induce to sell him drugs without a prescription. He chose him without the slightest cause to believe petitioner to be prone to such wrongdoing.

Wroobel used sympathy as an approach to petitioner. He had formerly been a drug salesman and petitioner had been a customer. He went to petitioner's drug store and told him of his financial and matrimonial problems that could be eased, if petitioner were to sell him tranquilizers without a prescription. Wroobel testified that petitioner turned him down. However, at the instance of the law enforcement officers, he tried again. This time allegedly petitioner sold him a bottle of Tenuate, a mild tranquilizer. Wroobel testified that after turning him down the first time, petitioner on the second approach, yielded. Petitioner explained that he turned Wroobel down twice for drugs without a prescription, before foolishly giving in, on the third occasion. He explained that on each occasion Wroobel hung around the drug store for an hour and a half begging for help and he gave in to the pressure, because Wroobel was interferring with petitioner's work and was more than a nuisance. Petitioner's partner after learning of the incident informed the petitioner that Wroobel had also approached him.

The record reveals that the law enforcement officers had no reason to believe that petitioner was illegally trafficking in drugs. There had been no prior complaints, nor even suspicions, of illegal trafficking in drugs by petitioner and his record was unblemished. That subsequent to the incident complained of Wroobel tried again to arrange a deal which was rejected by petitioner. What they did, was to send Wroobel out to drum up prosecution business, not being concerned how the latter pressured people into making an illicit sale. Indeed, at the hearing Wroobel testified as follows:

> Q. Sir, why did you go back after Mr. Sheikowitz had told you he did not wish to sell you any diet pills, why did you go back to the store?
>
> A. It was the only person that I knew for any length of time, and I needed money, and I was in a bad situation, I figured I would ask him once more."

It is undisputed that Wroobel refused to leave the drug store until petitioner yielded to his request and that Wroobel played on petitioner's sympathies and their long standing friendship.

At the Administrative Hearing, petitioner interposed the defense that due process of law had been violated by law enforcement officers who used their agent to entrap petitioner into dispensing a drug without a prescription, which he had no prior propensity to do. The facts in this case presented the issue of entrapment squarely and traditionally.

In this case, by the recommendation made the 20th day of July, 1976, the State Board of Pharmacy found the defense of entrapment inapplicable. In its recommendation specifically:

> "We cannot accept the excuse offered by the respondent that he dispensed a controlled substance without a prescription . . . as a result of being annoyed by the frequent presence of Roger Wroobel who had requested the drug. We cannot condone such conduct . . ." (Page 5 hereof).

The State Board of Pharmacy did not in its findings say that entrapment was not proved, but refused throughout to recognize that it was an available defense as it is in a criminal proceeding in New York State.

The State Board of Pharmacy rendered a decision finding petitioner guilty and recommending a three (3) month suspension of petitioner's license as a pharmacist, which was adopted by respondent. (See pages 9a-10a).

In accordance with Article 78 of the New York Civil Practice Law & Rules, petitioner brought on a special proceeding in the Appellate Division of the State of New York for the Third Judicial Department to review respondent's administrative decision.

The Appellate Division affirmed the decision of respondent, but failed to see the analogy between the exclusionary rule and its application in administrative proceedings, and the defense of entrapment. The Appellate Division saw the analogy as a request to have evidence obtained as a result of entrapment excluded in an administrative proceeding, where all that was asked was that the defense of entrapment be made applicable in an administrative proceeding where a person can be made to suffer a penalty, forfeiture or other sanction for violation of law or regulation. Pages 4a-5a. The New York State Court of Appeals denied leave to appeal.

REASONS FOR GRANTING THE WRIT

In Sherman v. U.S., 356 U.S. 369, 78 S. Ct. 819. 2 L Ed. 2d 848 (1958), this Court sharply criticized the "inducement method" used to persuade a reformed addict to obtain pills for a friend, who turned out to be an informer. In this case as in Sherman, the informer-agent refused to take "no" for an answer and continued to pursue the matter. This Court in Sherman held that entrapment of a defendant to the commission of a crime violates due process of law, and proceded to set aside the conviction. writing:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, a different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

§40.05 of the Penal Law of the State of New York establishes the defense of entrapment in criminal cases and for the most part follows the rationale of *Sherman v. U.S.* providing as follows:

> "In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant, or by a person acting in cooperation with a public servant, seeking to obtain evidence against him for purpose

> of criminal prosecution, and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it, inducement or encouragement to commit an offense means active inducement or encouragement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment."

What New York State has herein refused to do, is make that defense available in a proceeding where a parallel sanction of forfeiture of license with consequences at least as grave as those of criminal sanctions. The effect being that law enforcement officers, or prosecutors are able to elect to waive arrest and prosecution, file a suit quasi criminal in nature and by this device, deprive citizens of their rights, immunities and as here their defenses. When this case was rejected for purposes of criminal prosecution, and more than one and one half years after the event, the Drug Enforcement Agent filed a complaint with the State Board of Pharmacy, where entrapment is not a defense, and by this device was able to have a serious sanction imposed on a defenseless citizen. The law or lack of it which tolerates such a situation cries out for change especially where the creative activity of law-enforcement officials was responsible, in the first place. To allow this to exist is to allow forum shopping to define rights, immunities and defenses of citizens.

In a very analogous area, this court has refused to accept the classification of civil as opposed to criminal, in characterizing forfeiture proceedings as determinative of immunities of citizens. (One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693, 85 S. Ct. 1246, 14 L. Ed. 2d 170, 1965) Both the N.Y. Court of Appeals and the Appellate Division of the State Supreme Court have correctly applied and adopted the holding in

the 1958 Plymouth Sedan case. (Finn's Liquor Shop, Inc. v. State Liquor Authority, 24 N.Y. 2d 647, 301 N.Y.S. 2d 584, 249 N.E 2d 440; Matter of Leogrande v. State Liquor Authority, 25 A.D. 2d 225, 268 N.Y.S. 2d 433 (1st Dept., 1966)). In Leogrande, Breitel J. cited with approval, at 439, as follows:

> "In the 1958 Plymouth Sedan case the United States Supreme Court quoted with approval language from the case of Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746, where, in refusing to accept the classification of civil, as opposed to criminal, in characterizing forfeiture proceedings for the purposes of applying the Fourth Amendment, it was said (116 U.S. at p. 634, 6 S. Ct. at p. 534):
>
> "If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. * * * As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution. * * * "

All of the reasons in policy and due process which suggested the application of the exclusionary rule to illegal searches and seizures by public officers or agents in

criminal proceedings were held to apply equally to administrative proceedings, where penalties, forfeitures or other sanctions for the violation of law or regulation were in issue, these are the same reasons to hold entrapment as an available defense in administrative proceedings. To the extent that the State, or its agents, can bypass the deterrent effect of the exclusionary rule by using the fruits . . . in a civil or administrative proceeding, the incentive for enforcement and investigative personnel to exceed constitutional limitations on their activity remains and the effectiveness of the rule as a deterrent is diminished.

There is no rationale basis to hold the exclusionary rule applicable to administrative proceedings but not the defense of entrapment. There is no basis in reason to hold that rights of citizens may be determined by prosecutors' choice of forum, administrative proceeding—entrapment not an available defense, when the court has said rights of citizens may not be determined thereby, administrative proceeding—exclusionary rule applicable.

As our society has evolved, important rights are touched more and more by administrative proceedings in this case the certiorari should be granted to rule on the applicability of the defense of entrapment in such proceedings.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

DATED: AUGUST, 1977

GRECO & FARALDO
Attorneys for Petitioner
125-10 Queens Blvd.
Kew Gardens, N.Y. 11415
(212)544-6800

JOSEPH A. FARALDO
Of Counsel

ORDER DENYING LEAVE TO APPEAL

Mo. No. 644

In the Matter of the Application of
STANLEY SHEIKOWITZ.

Appellant.

vs.

THE BOARD OF REGENTS OF THE
UNIVERSITY OF THE STATE OF NEW YORK.

Respondent.

MOTION FOR LEAVE TO APPEAL AND FOR A STAY DENIED WITH TWENTY DOLLARS COSTS AND NECESSARY REPRODUCTION DISBURSEMENTS.

APPENDIX A

ORDER OF APPELLATE DIVISION DISMISSING PETITION

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 18th day of April, 1977.

P R E S E N T:

HON. HAROLD E. KOREMAN
Presiding Justice
HON. LOUIS M. GREENBLOTT
HON. T. PAUL KANE
HON. JOHN L. LARKIN
HON. J. CLARENCE HERLIHY
Associate Justices.

In the Matter of the Application of
STANLEY SHEIKOWITZ,

Petitioner.

-against-

THE BOARD OF REGENTS OF THE STATE OF NEW YORK,

Respondent.

The petitioner, Stanley Sheikowitz, having instituted this proceeding pursuant to Education Law §6510, subd. 4 to review a determination of the Board of Regents suspending the petitioner's license to practice as a pharmacist for a period of three months, and said proceeding having been argued during the above stated term of Court by Joseph A. Feraldo, Esq., for the petitioner, and by John J. O'Grady, Assistant Attorney General, of counsel for the respondent, and after due deliberation, the Court having rendered a decision on the 26th day of May, 1977, it is hereby

ORDERED, that the determination be and the same

is hereby confirmed, and the petition is dismissed, without costs.

ENTERED:

/a/ JOHN J. O'BRIEN

DATED AND ENTERED:

A TRUE COPY June 2, 1977

JOHN J. O'BRIEN, Clerk

APPENDIX B

OPINION OF APPELLATE DIVISION

SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

May 26, 1977
30416

In the Matter of STANLEY SHEIKOWITZ,

Petitioner,

vs.

BOARD OF REGENTS OF THE STATE OF NEW YORK,

Respondent.

Proceeding initiated in this court pursuant to subdivision 4 of section 6510 of the Education Law to review a determination of the Board of Regents suspending the petitioner's license to practice as a pharmacist for a period of three months.

The petitioner upon this proceeding does not dispute the finding of the respondent that he had dispensed drugs requiring a prescription without first having a prescription. Indeed, it is conceded that he knew that he should not do what he did.

Upon this proceeding the petitioner contends that the record establishes that he was entrapped by a police informer into dispensing the drug and that since he would

have a valid defense in a criminal trial of entrapment (Penal Law, § 40.05), the evidence should have been exlucded in this proceeding as "illegally" obtained. However, the mere fact that there exists a defense to a criminal proceeding does not mean that the evidence was illegally obtained. The contentions of the petitioner have no merit.

Determination confirmed, and petition dismissed, without costs.

KOREMAN, P.J., GREENBLOTT, KANE, LARKIN and HERLIHY, JJ., concur.

APPENDIX C

REPORT OF FINDINGS, DETERMINATION AND RECOMMENDATION

NEW YORK STATE EDUCATION DEPARTMENT
STATE BOARD OF PHARMACY
COMMITTEE ON PROFESSIONAL CONDUCT

In the Matter of the Application for the Revocation of the Authorization and License heretofore granted to

STANLEY SHEIKOWITZ

to practice as a pharmacist in the State of New York, and for the cancellation of his registration as such, and for such other relief as the premises warrant.

TO THE REGENTS COMMITTEE ON PROFESSIONAL DISCIPLINE:

The undersigned, Hearing Panel of the Committee on Professional Conduct of the State Board of Pharmacy duly designated to hear the charges against STANLEY SHEIKOWITZ hereinafter referred to as respondent, pursuant to Section 6510 of the Education Law of the State of New York, and to report its findings, determination and recommendation in respect to the said charges, do hereby, after due deliberation, unanimously report its findings, determination and recommendation as provided by law, as follows:

RECORD OF PROCEEDINGS

Petition containing charges verified: August 29, 1975

Notice of hearing upon charges returnable: October 31, 1975

Place of Hearing: 261 Madison Avenue, New York, N.Y.

Respondent served with copy of notice of hearing October 3, 1975 and charges:

Answer of respondent verified: No written answer interposed filed:

Petitioner appears by LOUIS J. LEFKOWITZ, Attorney General of the State of New York, By: MILTON H. ADLER, Assistant Attorney General

Respondent appears in person and by GRECO & FERALDO, Esqs., his attorney: 125-10 Queens Boulevard, Kew Gardens, New York, By: Joseph A. Faraldo, Esq.

Respondent's present address: 69-21 138th Street, Flushing, New York

Hearing(s) held on: October 31, 1975; March 29, 1976; May 13, 1976; and June 1, 1976

FINDINGS, DETERMINATION AND RECOMMENDATION OF HEARING PANEL

1. STANLEY SHEIKOWITZ, the respondent herein, was authorized to engage in the practice of pharmacy in the State of New York as a registered pharmacist by the

issuance to him of license No. 25767 on September 1, 1966 by the New York State Education Department.

2. Respondent was charged in these proceedings with unprofessional conduct within the purview and meaning of §6509, subd. 9 of the Education Law of the State of New York, and §63.3 of the Rules and Regulations of the Commissioner of Education of the State of New York, duly adopted by the Board of Regents, in that: heretofore and on or about February 26, 1974, at the pharmacy where he was employed, respondent sold and dispensed approximately 990 tablets (472.52 grams gross weight) of Diethylpropion Hydrochloride, a prescription-required Class IV Controlled Drug, without first having received a prescription, either written or oral, from an authorized prescriber.

Testifying in behalf of the petitioner were Gerald Graffam, a Special Agent of the Drug Enforcement Administration; Richard Piccininni, a Detective of the Nassau County Police Department; and Jeffrey Weber, a Forensic Chemist of the Drug Enforcement Administration. Respondent appeared by counsel and testified in his own behalf. In addition, Roger Wroobel; Louis Auricchio, the respondent's partner; and Carmine Auricchio, Rita Steinmetz, Marvin Hanin, and Joseph Weingarten, character witnesses, testified in behalf of respondent. There is in evidence before us the Investigation Reports of Gerald Graffam; the report of Jeffrey Weber, Forensic Chemist of the Drug Enforcement Administration; a prescription; the renewal application for registration for 1974-1975 of the Midville Chemists; a bottle of Diethylpropion Hydrochloride tablets; and numerous boxes of pharmacist samples, and five jars of Azulfidine.

FINDINGS OF FACT

1. We find that respondent was employed as a pharmacist at the retail pharmacy conducted by MIDVILLE CHEMISTS, INC., located at 225 Post Avenue, Westbury, New York, in February of 1974. The respondent was President of the corporation. Respondent's partner, Louis Auricchio, was the Secretary-Treasurer of the corporation and was the supervising pharmacist in the pharmacy in question.

2. We find that, on February 26, 1974, respondent dispensed a bottle containing 990 Diethylpropion Hydrochloride tablets for the sum of $60, without first having received an authorized prescription from the purchaser.

3. We find that the contents of the aforementioned bottle was analyzed by Jeffrey Weber, a Forensic Chemist of the Drug Enforcement Administration. Said bottle contained 990 tablets (472.52 grams gross weight) of Diethylpropion Hydrochloride, a prescription-required, Class IV Controlled Drug.

4. We find that the respondent was not threatened or otherwise forced to sell the said Diethylpropion Hydrochloride, but admitted that he had dispensed and sold the aforementioned drug, although he knew and admitted that the said transaction was illegal.

DETERMINATION

In making our determination, we have considered the entire record. We find it immaterial as to whether the aforementioned bottle of 990 Diethylpropion Hydrochloride tablets was dispensed and sold to Roger Wroobel or to Gerald Graffam inasmuch as the transaction constituted an illegal act, regardless as to whom the tablets were dispensed. We consider the testimony as to con-

versations on the subject of additional illegal transactions, held between the respondent and Roger Wroobel several months after February 26, 1974, to be irrelevant to the respondent's guilt or innocence as to the transaction that occurred on that date.

We find and conclude that the charge set forth, as stated above, has been proved by substantial legal evidence, and we find the respondent guilty of the same.

RECOMMENDATION

In considering the measure of discipline to be recommended to the Board of Regents, we have considered the entire record, including the character evidence submitted in behalf of respondent. We cannot accept the excuse offered by the respondent that he dispensed a controlled substance without a prescription from one duly authorized to prescribe, as a result of being annoyed by the frequent presence in his pharmacy of Roger Wroobel, who had requested the drug.

We cannot condone such conduct and, accordingly, recommend to the Board of Regents that respondent's license and registration to practice pharmacy in the State of New York be suspended for a period of three months.

Dated: New York, N.Y. July 20, 1976

RAYMOND LaFALCE
META SMITH
EUGENE H. MILLS, JR.
ELIO LISCIO
ABRAHAM L. DUBINBAUM

RAYMOND LaFALCE, Chairman

THE UNIVERSITY OF THE STATE OF NEW YORK

In the Matter of the Application for the revocation of the authorization and license heretofore granted to STANLEY SHEIKOWITZ to practice as a pharmacist in the State of New York, for the cancellation of his registration as such, and for such other relief as the premises warrant.

Report of the Regents Review Committee

STANLEY SHEIKOWITZ, hereinafter referred to as respondent, was licensed to practice as a pharmacist in the State of New York on September 1, 1966 by the New York State Education Department. Respondent was issued license No. 25767 and was registered from an address at 69-21 138th Street, Flushing, New York.

On October 3, 1975 the instant disciplinary proceeding was commenced by service of the notice of hearing and petition upon respondent.

The petition charged respondent with unprofessional conduct. A copy of the charges is annexed hereto, made a part hereof, and marked as Exhibit "A".

Respondent did not submit a written answer.

Respondent appeared and was represented by an attorney.

On October 31, 1975, March 29, 1976, May 13, 1976, and June 1, 1976 a hearing was held before a Hearing Panel of the Committee on Professional Conduct of the State Board of Pharmacy.

The Hearing Panel rendered a report of its findings, determination and recommendation, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit "B".

The Hearing Panel found and determined that respondent was guilty of unprofessional conduct and recommended that respondent's license to practice as a pharmacist in the state of New York be suspended for a period of three months.

On October 6, 1976 respondent appeared before us in person and was represented by his attorney, Joseph A. Faraldo, Esq. Petitioner was represented by Milton H. Adler, Assistant Attorney General.

We have carefully reviewed and considered the entire record, the brief submitted to us by respondent, and the statements made before us.

We unanimously recommend that the Board of Revents accept the findings and determination of the Hearing Panel of the Committee on Professional Conduct of the State Board of Pharmacy that respondent is guilty of the charges of unprofessional conduct and its recommendation that respondent's license to practice as a pharmacist in the State of New York be suspended for a period of three months upon the charges of which respondent was found guilty.

Respectfully submitted,

KENNETH B. CLARK
DANIEL GUTMAN
FREDERICK L. WEISLER

Kenneth B. Clark, Chairman

October 27, 1976

FILED
OCT 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-

No. 284

STANLEY SHEIKOWITZ,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Office & P.O. Address
261 Madison Avenue
New York, New York 10016
Tel. No. (212) MU 7-5850

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOHN J. O'GRADY
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

	PAGE
Opinions below	1
Jurisdiction	1
Question Presented	2
Statement of the Case	2
Reasons for Denying the Writ	5
Conclusion	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 284

STANLEY SHEIKOWITZ,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Opinions below

The opinion of the New York Supreme Court, Appellate Division Third Department is reported at 57 AD 2d 1031 and is reproduced as Appendix B to the petition. The New York Court of Appeals denied leave to appeal to that Court on July 7, 1977. The Court of Appeals' order, not yet officially reported, is reproduced as "Appendix A" to the petition.

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

Question Presented

Whether, under all the facts adduced at a disciplinary hearing into the conduct of a professional licensee, the hearing panel's finding on conflicting evidence that petitioner made an illegal sale of drugs and was not entrapped by state or federal agents denies him due process under the 14th amendment. The New York State Courts have found that the finding of fact was based upon sufficient legal evidence.

Statement of the Case

Petitioner, a New York State licensed pharmacist, was found guilty in a disciplinary hearing before a State Administrative Agency of selling 990 diethylpropion hydrochloride tablets, a prescription-required drug without a prescription, to an agent of the United States Drug Enforcement Administration (New York Education Law §§ 6509 and 6510).

The hearing panel found that "on February 26, 1974 [petitioner] dispensed a bottle containing 990 Diethylpropion Hydrochloride tablets for the sum of $60, without first having received an authorized prescription from the purchaser." The panel also found, ". . . that the [petitioner] was not threatened or otherwise forced to sell the said Diethylpropion Hydrochloride, but admitted that he had dispensed and sold the aforementioned drug, although he knew and admitted that the said transaction was illegal."

The panel also ruled it immaterial whether the bottle of 990 Diethylpropion Hydrochloride tablets was dispensed and sold to Roger Wroobel or Gerald Graffam. The transaction constituted an illegal act in either case (the finding is reproduced as Appendix C to the petition).

In recommending a measure of discipline (a three month suspension of license) for the illegal sale, the panel disbelieved and rejected petitioner's claim that he had been entrapped into the sale by one Roger Wroobel (Appendix-C).

The only hint of entrapment in this case came from the mouth of the petitioner who fabricated the story in an attempt to avoid the consequences of his illegal conduct. In finding that petitioner was lying, the hearing panel believed the testimony of agent Graffam and Roger Wroobel that they were both in petitioner's store on February 26, 1974, when petitioner sold the drug to Graffam for $60.

Officer Piccininni of the Nassau County Police Department testified that he saw Graffam and Wroobel enter the store on that date and exit with the purchase. Obviously, petitioner was lying when he insisted he delivered the drugs to Wroobel and swore that Graffam was not in the store at all.

Contrary to the assertions in the petition for certiorari (p. 3) the police officer did not turn Wroobel or anyone else loose to prey on innocent persons. Actually, an informer advised the police officer that Wroobel offered to obtain drugs from a pharmacist for resale if he could find a buyer for them. The officers did not choose petitioner for investigation, but merely followed through on a lead presented to them. They initially thought that Wroobel would be the defendant. It was not until petitioner freely sold a prescription-required drug without prescription to agent Graffam in his pharmacy that the petitioner became a subject of the investigation.

Contrary to petitioner's assertion at p. 4 of his petition, respondent vigorously disputes the claim that "Wroobel refused to leave the drug store until petitioner yielded to his request". The hearing panel, based upon facts in the record, found exactly to the contrary. The panel "found that [petitioner] was not threatened or otherwise forced to sell" the drug illegally. They refused to accept petitioner's proffered excuse that he dispensed the drug with-

out prescription "as a result of being annoyed by the frequent presence in his pharmacy of Roger Wroobel, who had requested the drug."

The Panel believed Wroobel when he testified that petitioner agreed to sell him 2,000 Librium after about 15 minutes rather than the hour and a half claimed by petitioner. That testimony is further confirmed by the fact that Wroobel, on February 26, 1974, was able, within 15 minutes, to return to petitioner's store, reject the offer of 2,000 Librium and arrange a sale of 990 Diethylproprion Hydrochloride tablets and telephone the officers that a sale of a stronger drug was arranged.

Petitioner's claim of entrapment was rejected by the Panel as a finding of fact. Nowhere did the Panel state that the defense of entrapment was rejected as a matter of law.

The Appellate Courts of New York State have ruled that a finding of fact made by an administrative agency will not be disturbed by the courts unless that finding is so devoid of factual basis as to be arbitrary, unreasonable and hence an abuse of discretion. *Matter of Pell* v. *Board of Education,* 34 N.Y. 2d 222 (1974); *Hotel Ass'n of New York City Inc.* v. *Weaver,* 3 N.Y. 2d 206, 213 (1957).

The hearing panel must pass upon the credibility of witnesses and base its inferences on what it accepts as the truth; *Matter of Collins* v. *Codd,* 38 NY 2d 269 (1976); *Matter of Avon Bar & Grill* v. *O'Connell,* 301 N.Y. 150, 153 (1950); *Matter of Sternfels* v. *Board of Regents,* 20 AD 2d 840 (3rd Dept., 1964) lv. to app. den. 15 N.Y. 2d 488 (1965), cert. den. 382 U.S. 901 (1965).

In this case the Court started from the premise that a finding of fact contrary to petitioner's assertions was made by the hearing panel based upon substantial legal evidence. Petitioner therefore fails to establish any constitutional issue of entrapment.

Reasons for Denying the Writ

Petitioner has failed to raise any question of general importance warranting the exercise of the Court's certiorari jurisdiction, S. Ct. Rules, Rule 19 (1) (b).

The record in this case consists of a full evidentiary hearing followed by a factual determination contrary to petitioner's allegation of "entrapment". There is no factual basis for petitioner's allegation that an administrative agency refused to recognize the defense and "proof" of entrapment. The administrative agency clearly ruled that petitioner did not sustain his claim of entrapment on the facts.

CONCLUSION

Certiorari should be denied.

Dated: New York, New York
September 27, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOHN J. O'GRADY
Assistant Attorney General
of Counsel